

NOTICE

Memorandum decisions of this Court do not create legal precedent. See Alaska Appellate Rule 214(d) and Paragraph 7 of the Guidelines for Publication of Court of Appeals Decisions (Court of Appeals Order No. 3). Accordingly, this memorandum decision may not be cited as binding authority for any proposition of law.

IN THE COURT OF APPEALS OF THE STATE OF ALASKA

EDWARD GAYLORD BYFORD JR.,

Appellant,

v.

STATE OF ALASKA,

Appellee.

Court of Appeals No. A-11832
Trial Court No. 3KN-12-745 CI

MEMORANDUM OPINION

No. 6438 — March 15, 2017

Appeal from the Superior Court, Third Judicial District, Kenai,
Charles T. Huguelet, Judge.

Appearances: Renee McFarland, Assistant Public Defender, and
Quinlan Steiner, Public Defender, Anchorage, for the Appellant.
Eric A. Ringsmuth, Assistant Attorney General, Office of
Criminal Appeals, Anchorage, and Craig W. Richards, Attorney
General, Juneau, for the Appellee.

Before: Mannheimer, Chief Judge, Allard, Judge, and Suddock,
Superior Court Judge.*

Judge ALLARD.

* Sitting by assignment made pursuant to Article IV, Section 16 of the Alaska Constitution and Administrative Rule 24(d).

Following a jury trial, Edward Gaylord Byford Jr. was convicted of scheme to defraud and first-degree theft by deception, based on evidence that he defrauded eight different individuals out of more than \$200,000 by entering into contracts to build log homes and then never building the homes or refunding their money.¹ Byford was also convicted of engaging in deceptive business practices based on evidence that he ran a business website displaying pictures of log homes he claimed to have built that were actually built by people with no connection to him or his company.² At sentencing, the superior court merged the three convictions and sentenced Byford to a composite term of 6 years with 3 years suspended, 3 years to serve.

Byford filed a direct appeal challenging his convictions and sentence. The State cross-appealed, challenging the merger of the convictions. We affirmed Byford's convictions and sentence and agreed with the State that the scheme to defraud and deceptive business practices convictions should not have merged.³

While Byford's appeal was still pending, Byford filed an application for post-conviction relief in the superior court, alleging multiple instances of ineffective assistance of counsel by his trial attorney. The two claims pertinent to this appeal are as follows: (1) Byford claimed that his trial attorney was ineffective for failing to obtain an independent financial expert to testify on Byford's behalf at trial; and (2) Byford claimed that his attorney was ineffective for failing to seek admission of a "daily log" created by Byford that Byford asserted was admissible under the business records exception to the hearsay rule.

¹ AS 11.46.600(a) & AS 11.46.120(a).

² AS 11.46.710(a).

³ *See Byford v. State*, 352 P.3d 898, 900 (Alaska App. 2015).

The superior court dismissed both claims on the pleadings for failure to state a *prima facie* case of ineffective assistance of counsel. This appeal followed.

For the reasons explained here, we affirm the dismissal of Byford's application for post-conviction relief.

Relevant background facts

In 2009, the State filed criminal charges against Byford, alleging that he had defrauded at least eight people over the course of two and a half years by entering into contracts to build log homes that he never built. The State also alleged that Byford had misrepresented his qualifications to the victims and had run a deceptive website that displayed photographs of log homes purportedly built by Byford but actually built by other contractors.

At Byford's trial, the State presented testimony from Byford's numerous victims. The victims testified that they had entered into contracts with Byford and provided him with substantial amounts of money, only to receive nothing of value in return. The victims also testified to various examples of Byford's deceptive business practices, including the fact that Byford had misrepresented his qualifications and credentials and had directed them to log homes in their area that Byford falsely claimed that he had built. When the victims confronted Byford about his misrepresentations and his failure to do any of the promised work, they were met with further evasions and lies. In the majority of the cases, Byford failed to purchase the necessary supplies to begin the work. In a few cases, Byford did some preliminary work, but the work was so substandard that it cost the victims even more money to correct Byford's mistakes. One victim testified that he felt he had been a victim of "a Ponzi scheme." Another testified that he felt that Byford had simply "stole[n] my money."

In further support of the criminal charges, the State also introduced Byford's financial records into evidence, and the State offered the testimony of a financial investigator who had reviewed these records. The State's investigator testified that the records showed that there was a significant amount of money still unaccounted for, and that Byford had spent relatively little of the money he received from the victims buying supplies for the log homes he was contracted to build. Instead, the records showed that as soon as Byford received the cash payments from the victims, he immediately used the money on personal expenses rather than business-related expenses. The investigator concluded, based on his review and the nature of the personal items Byford purchased with the victims' money, that Byford was using the down payments from his customers to fund his lifestyle.

To counter the State's financial expert's testimony, the defense presented the testimony of Byford's fiancée, Lori Woitel, who was an accountant with more than twenty-five years of experience. Woitel conceded that Byford had spent very little of the money he obtained from the victims to buy home building supplies. But she offered more benign explanations for the accounting problems, asserting that Byford did not understand how to manage his business, and that he short-changed himself in his contracts. Woitel also provided slightly different numbers than the State's expert, and she drew up competing spreadsheets documenting what she believed to be the correct analysis of Byford's financial records. Woitel told the jury that, after she discovered the problems in Byford's records, she took over the management of his business and she now handled all of the money and accounting.

During closing argument, the prosecutor emphasized the similarity between Woitel's testimony and the State's financial expert's testimony, arguing that despite their differences, both witnesses had agreed on the "critical" numbers — that is, they both agreed on how little of the victims' money was used to buy home building supplies and

how much money was still unaccounted for. The prosecutor otherwise downplayed the significance of the financial testimony in the case, declaring that this was not a case about “accounting or spreadsheets,” but was instead a case about affirmative misrepresentations, lies, and broken promises.

The jury rejected Byford’s defense that he was just a bad businessman, convicting Byford of the charged offenses.

Byford’s application for post-conviction relief

Soon after judgment was entered in Byford’s criminal case, and while his direct appeal was still pending, Byford filed an application for post-conviction relief in the superior court.

In his application, Byford alleged that he had received ineffective assistance of counsel and that no competent attorney would have proceeded to trial without obtaining an independent and properly credentialed financial expert to testify for the defense. Byford also alleged that his trial attorney had been ineffective for failing to introduce Byford’s “daily log” into evidence under the business records exception to the hearsay rule.⁴

The State moved to dismiss both claims for failure to state a *prima facie* case of ineffective assistance of counsel. The superior court ultimately granted the State’s motion to dismiss.

⁴ Byford also raised other claims that are not at issue in this appeal.

Byford's pleadings failed to state a prima facie case for relief on either of his claims

To plead a *prima facie* case for relief based on ineffective assistance of counsel, a defendant must plead facts that, if true, would be sufficient to establish both prongs of the test announced in *Risher v. State*.⁵ That is, the defendant's pleadings must contain well-pleaded facts showing (1) that his attorney's performance fell below the objective standard of minimum competence required of criminal law practitioners, and (2) that there is a reasonable possibility that the outcome of the trial would have been different but for the incompetent performance of his attorney.⁶

Whether a defendant's pleadings state a *prima facie* case for relief is a question of law that we review de novo.⁷

Here, Byford claimed that his attorney was incompetent because he failed to obtain an independent financial expert to testify on Byford's behalf. In support of this claim, Byford provided affidavits from himself, Woitel, and his trial attorney. Read in the light most favorable to Byford, as we are required to do at this initial pleading stage,⁸ these affidavits show that Byford and Woitel repeatedly warned the trial attorney that this was a financially complex case that required the expertise of a certified public accountant. Byford and Woitel also told the attorney that he could not rely on Woitel to counter the State's anticipated financial expert's testimony, both because Woitel did not

⁵ 523 P.2d 421, 424-25 (Alaska 1974); *see also* U.S. Const. amend. VI; Alaska Const. art. I, § 11.

⁶ *See Risher*, 523 P.2d at 424-25; *State v. Jones*, 759 P.2d 558, 567-68, 572 (Alaska App. 1988).

⁷ *David v. State*, 372 P.3d 265, 269 (Alaska App. 2016).

⁸ *See Steffensen v. State*, 837 P.2d 1123, 1125-26 (Alaska App. 1992).

have the proper credentials and because Woitel's personal relationship to Byford made her seem biased.

We agree with Byford that, based on these pleadings, there may be good reason to be critical of the trial attorney's failure to obtain an independent financial expert to testify for the defense. But this is not enough to plead a *prima facie* case for relief under the *Risher* standard. Byford also needed to offer reason to believe that obtaining an independent financial expert would have actually made a difference in the outcome of Byford's case.

Byford contends that obtaining a financial expert would have made a difference in his case because it would have provided the jury with additional reason to trust Woitel's financial analysis. But this argument assumes that the proposed financial expert would have agreed with Woitel's analysis rather than with the State's analysis — an assumption that is not supported by Byford's pleadings. In his pleadings, Byford claims that there was an independent financial expert that Woitel had identified who was willing to testify at Byford's trial. But Byford does not provide an affidavit from this expert or any other financial expert. It is also not clear that this expert ever reviewed Byford's financial records and what conclusions, if any, the expert made based on that review. Because Byford's pleadings failed to offer any evidence from an independent financial expert who had reviewed the records in his case, we agree with the superior court that Byford's pleadings failed to state a *prima facie* case on the prejudice prong of the *Risher* test.

We also agree with the superior court's decision to dismiss Byford's claim related to his "daily log." The "daily log," which was created and compiled by Byford, purports to chronicle Byford's troubles during the time period relevant to the State's charges. According to the log, there were various instances in which Byford's construction equipment and materials were stolen or destroyed. The log also includes

Byford's personal account of his interactions about these alleged thefts with various state officials from the District Attorney's Office, the Attorney General, and the Alaska State Troopers. The log includes Byford's account of the investigation that led to the current charges.

In his application for post-conviction relief, Byford asserted that the log was admissible under the business records exception to the hearsay rule and he argued that the log was critical evidence for his defense because it helped explain why he was unable to fulfill his contractual obligations to the victims. In support of this claim, Byford submitted an affidavit from his trial attorney. But in his affidavit, the attorney indicated that he believed the log was created for litigation purposes and was thus inadmissible under the business records exception. The attorney also concluded that the log would be inadmissible because Byford did not wish to take the stand and because nobody other than Byford could authenticate it and lay the necessary foundation.

Alaska Evidence Rule 803(6), the business records exception to the hearsay rule, allows a party to introduce into evidence a "memorandum, report, record, or data compilation, in any form," that describes "acts, events, conditions, opinions, or diagnoses" of a regularly conducted business, provided that the party can show that: (1) the record was made at or near the time of the occurrence; (2) the record was made by, or was based on information transmitted by, a person with knowledge acquired of a regularly conducted activity of that business entity; and (3) it was the regular practice of that business entity to make and keep that kind of record.⁹ As a general matter, the business records exception does not allow the introduction of reports prepared by a business entity's employees "where the only function that the report serves is to assist

⁹ See also *Wassillie v. State*, 366 P.3d 549, 552 (Alaska App. 2016).

in litigation or [in] preparation [for litigation] — because, in such circumstances, many of the normal checks upon the accuracy of business records are not operative.”¹⁰

Here, Byford does not dispute that he created the log, at least in part, to pursue litigation related to his business. He also admits that he sent a copy of the log to the FBI for that purpose. We therefore agree with the superior court that Byford has not shown reason to believe that his attorney was incompetent (or even incorrect) in concluding that this evidence was inadmissible under the business records exception to the hearsay rule.

Moreover, as Byford’s attorney also recognized, introducing the log into evidence would have required “testimony of the [records] custodian or other qualified witness”¹¹ — which in this case would be Byford himself, who chose not to testify at his trial. We recognize that Byford now claims that he would have been willing to testify to make sure that the daily log was admitted as a business record, and he further claims that he told his attorney about his willingness to so testify. But Byford did not make this claim until he filed his opposition to the State’s motion to dismiss, and Byford failed to supplement this new assertion with any response from his trial attorney either confirming or denying that this conversation took place. As the superior court properly recognized, Byford’s failure to supplement his pleadings with a response from his trial attorney is fatal to his claim.¹² We also note that if Byford had taken the stand and testified at trial, he would have been subject to cross-examination by the prosecutor — a risk that Byford

¹⁰ *Id.* at 553 (internal quotation marks omitted).

¹¹ Alaska Evid. R. 803(6).

¹² *See Allen v. State*, 153 P.3d 1019, 1022 (Alaska App. 2007) (petitioners are required to at least attempt to get an affidavit from their trial attorney that responds to all contentions).

was unwilling to take at the time, even if he is apparently willing to second-guess that decision now.¹³

Conclusion

The judgment of the superior court is AFFIRMED.

¹³ The superior court's order inartfully refers to "[Byford's attorney] making a tactical decision ... to not have Mr. Byford testify." We assume that the superior court meant either that Byford himself made a tactical decision not to testify or that Byford's attorney *advised* Byford against testifying *for tactical reasons*. The trial record shows that Byford explicitly waived his right to testify on the record after receiving the proper advisements from the trial court.